DOCKET NO.: 1200802

IN THE SUPREME COURT OF ALABAMA

STANLEY LOCHRIDGE, M.D. and
CARDIO-THORACIC SURGEONS, P.C.,

Appellants,

v.

FRANCES ANN TOMBRELLA, Individually, and
FRANCES ANN TOMBRELLA, In her Capacity as Special Administratrix of the Estate of RONALD SANTO TOMBRELLA,

Appellee.

Appeal from the Circuit Court of Jefferson County, Alabama
Case No. 01-CV-2019-903763

BRIEF OF APPELLEE

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ORAL ARGUMENT NOT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Appellee Frances Ann Tombrella ("Tombrella") does not desire oral argument in this matter. However, if the Court believes oral argument would be of assistance to it in deciding this matter, Appellee Tombrella will embrace the opportunity to assist this Honorable Court. Appellee Tombrella believes the issues, facts, and legal arguments presented in this appeal are sufficiently defined and have been adequately addressed in the briefs of the parties, in the record, and by the trial court below such that this Court can make a decision based upon those materials and the information available to it. The issues raised by Appellants Stanley Lochridge, M.D. ("Lochridge") and Cardio-Thoracic Surgeons, P.C. ("CTS") on appeal have been thoroughly addressed and opined upon by many courts whose decisions and opinions represent binding and persuasive authority that provide clear guidance to this Court in rendering any decision in this appeal.

Respectfully submitted,

/s/ Anthony Piazza
Anthony Piazza (PIA001)

Attorney for Appellee Frances Ann Tombrella

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STATEMENT OF THE CASE/STATEMENT OF THE FACTS[1]

On August 22, 2019, Tombrella filed her Complaint in this case, asserting medical negligence claims against Lochridge, CTS, St. Vincent's Hospital, and certain nurses based upon the wrongful death of her husband, Ronald Tombrella, which occurred on August 25, 2017. (C. 28-46). When she filed her Complaint on August 22, 2019, Tombrella requested that the clerk for the Circuit Court of Jefferson County, Alabama (Birmingham Division) serve process on CTS through its listed registered agent, Carlton Randleman, at 880 Montclair Road, Suite 270, Birmingham, Alabama 35213 by "Certified Mail – Restricted Delivery – With Return Receipt Requested." (C. 22, 47). When she filed her Complaint on August 22, 2019, Tombrella requested that the clerk serve Lochridge by using a sheriff as a process server. (C. 52). Tombrella directed the sheriff to serve process on Lochridge at 2871 Acton Road, Suite 100, Birmingham, Alabama 35243, which was the listed address of Lochridge's medical practice Cardio-Thoracic Surgeons, P.C. (C. 52).

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[1] Like the Appellants, Tombrella has combined her Statement of the Case and Statement of the Facts into one section for the sake of providing this Court consistency in the format of the briefs in this appeal.

Service was initially attempted on CTS by certified mail issued by the clerk at the listed address for its registered agent, Carlton Randleman, 880 Montclair Road, Suite 270, Birmingham, Alabama 35213, but service was returned to the clerk on September 6, 2019 stamped "RETURN TO SENDER, NO SUCH NUMBER, UNABLE TO FORWARD." (C. 59-60). Service was initially attempted on Lochridge by the sheriff at the listed address for his medical practice, Cardio-Thoracic Surgeons, P.C., 2871 Acton Road, Suite 100, Birmingham, Alabama 35243, but service was returned to the clerk by the sheriff on October 9, 2019 as "not served" due to "unable to make contact." (C. 183).

While Tombrella was initially represented by counsel for approximately the first 77 days after her Complaint was filed, for 15 of those 77 days her counsel could not have known that the attempts to serve CTS had failed, and for 48 of those 77 days her counsel could not have known that the attempts to serve Lochridge had failed. That was because the return receipts for the certified mail summons and Complaint and the sheriff process server summons and Complaint were not returned to the clerk indicating failed service until September 6, 2019 and October 9, 2019. (C. 59, 60, 183).

Notwithstanding the clerk receiving notices on September 6, 2019 and October 9, 2019 that Tombrella's initial attempts to serve Lochridge and CTS were unsuccessful, on November 6, 2019, counsel for Lochridge and CTS in this case filed a Notice of Appearance identifying themselves "as the attorneys of record for Stanley Lochridge, M.D. and Cardio-Thoracic Surgeons, P.C." (C. 7, 236-37). No motion to dismiss was filed at that time. Tombrella's initial counsel in this case filed a motion to withdraw from the case on November 7, 2019, and the trial court entered an order granting that motion to withdraw on November 15, 2020. (C. 238-45). On December 10, 2019, St. Vincent's Hospital and the nurse defendants filed a motion to dismiss Tombrella's Complaint based upon the grounds that the Tombrella could not represent the estate since she was a "non-attorney executrix," and under Alabama law she could not act *pro se* on behalf of her deceased husband's estate. (C. 255-58). Counsel for Lochridge and CTS received notice of the motion to dismiss filed by St. Vincent's Hospital and the nurse defendants, as indicated by the certificate of service appearing at the end of St. Vincent's Hospital's motion. (C. 258).

On January 9, 2020, the trial court entered an Order allowing Tombrella 30 days to obtain replacement counsel because under Alabama law, as a *pro se* plaintiff in a wrongful death action, Tombrella could not represent the interests of her deceased husband's estate without being represented by an attorney. (C. 262-63). The trial court then entered an Order later that same day setting a status conference to take place on February 28, 2020. (C. 264). On February 8, 2020, current counsel for Tombrella filed a Notice of Appearance on behalf of the Tombrella. (C. 266-67). On February 28, 2020, the trial court held a status conference, and on March 2, 2020, the trial court entered an Order mooting the motion to dismiss that had been filed by St. Vincent's Hospital and the nurse defendants. (C. 268).

On May 7, 2020, Tombrella filed an Alias Summons and Complaint with a request that the clerk serve process on Lochridge by certified mail at 1880 Whittemore Road, Jasper, Alabama 35503. (C. 10, 341-61). On May 18, 2020, Tombrella filed an Alias Summons and Complaint with a request that the clerk serve process on CTS courtesy of Carlton Randleman, its registered agent, at 2704 20th Street South, Suite 100, Birmingham, Alabama 35209. (C. 11, 442-62).

The record shows that for some unexplained reason, the Alias summonses and Complaints Tombrella filed on May 7, 2020 and May 18, 2020 and directed the clerk to serve on Lochridge and CTS via certified mail did not leave the clerk's office until June 16, 2020. (C. 493-538). The service return receipts showing that service of process had been successfully perfected on Lochridge and CTS on June 22, 2020 were received by the clerk and filed in the record on June 23, 2020 and June 24, 2020. (C. 549-50, 558-59).

On June 22, 2020, the same day Lochridge and CTS were both successfully served process and before the service return receipts for those executed summonses and Complaints had been returned to the clerk's office or filed in the record, Lochridge and CTS filed a motion to dismiss the claims against them based, in part, on their assertion that Tombrella had failed to timely serve process on them within the 120-day time limit set forth in Ala. R. Civ. P. 4(b). (C. 539-48). The trial court set Lochridge and CTS's motion to dismiss for hearing on July 23, 2020. (C. 551-57). Tombrella filed a Response in Partial Opposition to Lochridge and CTS's motion to dismiss on July 21, 2020. (C. 566-573).

In her Opposition to Lochridge and CTS's motion to dismiss, Tombrella explained her unsuccessful previous attempts to effect service on Lochridge and CTS, including the fact that the address at which she had unsuccessfully attempted to serve process on CTS in August 2019 and May 2020 was, as of May 7, 2020, still listed as the current address for CTS's registered agent. (C. 567-70). In her Opposition, Tombrella also explained her inability to continue to pursue her claims during the November 2019 to February 2020 time period when she was not represented by counsel, and she appealed to the trial court to exercise its "broad discretion" to extend the time limit to effect service on Lochridge and CTS and deny their motion to dismiss. (C. 569-70). Tombrella also noted in her Opposition that she had successfully effected service on Lochridge and CTS prior to the filing of their motion to dismiss. (C. 570).

On July 21, 2021, the trial court entered an Order denying Lochridge and CTS's motion to dismiss. (C. 841). On August 4, 2021, Lochridge and CTS jointly filed an Answer to Tombrella's Complaint. (C. 851-68). On August 9, 2021, in response to the trial court's July 21, 2021 Order denying their motion to dismiss, Lochridge and CTS filed a Motion to Reconsider or, Alternatively, To Certify Question for Interlocutory

Appeal. (C. 869-80). Less than 48 hours later on August 11, 2021, the trial court entered an Order granting Lochridge and CTS's motion and certifying, verbatim without any alteration, the question that had been submitted and proposed by Lochridge and CTS in their motion. (C. 884-87). This appeal followed.

STATEMENT OF THE ISSUES

Appellants Lochridge and CTS incorrectly identify the issues this Court must decide. There is only one (1) issue in this appeal that requires this Court's determination:

I. Whether the trial court abused its discretion by extending the time limit for Tombrella to effect service of process on Lochridge and CTS under Ala. R. Civ. P. 4(b) and denying Lochridge and CTS's motion to dismiss Tombrella's claims based upon Tombrella's failure to effect service on Lochridge and CTS within the 120-day time limit stated in Ala. R. Civ. P. 4(b)?

STATEMENT OF THE STANDARD OF REVIEW

Appellants Lochridge and CTS state an incorrect standard of review for this appeal. The standard of review is not *de novo*. The correct standard of review in this appeal is whether the trial court abused the discretion afforded it under Ala. R. Civ. P. 4(b) with respect to extending the 120-day time limit for Tombrella to effect service on Lochridge and CTS. See Voltz v. Dyess, 148 So. 3d 425, 426 (Ala. 2014) (citations omitted); Lepone-Dempsey v. Carroll County Comm'rs, 476 F.3d 1277, 1280 (11th Cir. 2007) ("We ... review for abuse of discretion a court's decision to grant an extension of time under Rule 4(m).") (citing Horenkamp v. Van Winkle & Co., 402 F.3d 1129, 1133 (11th Cir. 2005)).

It is a well-established that "this Court will affirm the ruling of a trial court if it is right for any reason." See Wiggins v. Warren Averett, LLC, 307 So. 3d 519, 522 n. 3 (Ala. 2020) (citing Ex parte Beverly Enters.-Alabama, Inc., 812 So. 2d 1189, 1195 (Ala. 2001) ("An appellate court will affirm a ruling of a lower court if there is any valid reason to do so, even a reason not presented to – or rejected by – the lower court.")); see also Cassels v. Pal, 791 So. 2d 947, 954 (Ala. 2001) ("A ruling of a trial court, right for any reason supported by the record, should be affirmed on

appellate review.") (citations omitted); Southern Energy Homes, Inc. v. Gregor, 777 So. 2d 79, 81 (Ala. 2000) ("this Court can affirm the ruling of a trial court for any valid reason, even one not presented to or considered by the trial court.") (citations omitted).

SUMMARY OF THE ARGUMENT

Lochridge and CTS ask this Court to enforce Rule 4 not as it is currently and actually written, but as it was drafted in previous versions long before this case began. Ala. R. Civ. P. 4(b) did not exist prior to August 1, 2004. When it was added to Rule 4 in 2004, the Civil Rules Committee noted that it was "new to Alabama" and "is borrowed from Fed. R. Civ. P. 4(m)," and "[t]he text is taken from the federal rule, except for the provisions for 14 days' notice and for fictitious party practice." Committee Comments to August 1, 2004 Amendment to Rule 4. Prior to 1993, Fed. R. Civ. P. 4(m) was Fed. R. Civ. P. 4(j). Rule 4(j) only permitted trial courts to extend the time for effecting service of process on a defendant beyond the then-stated 120-day time limit if a plaintiff showed "good cause," and mandated dismissal of a plaintiff's claims if a showing of good cause was not made. Lochridge and CTS ask this Court to impose and enforce the requirements of former Fed. R. Civ. P. 4(j) and that version of Rule 4 on Tombrella and her claims against them, not Ala. R. Civ. P. 4(b) which, like Fed. R. Civ. P. 4(m), contains a discretionary component pursuant to which the trial court in this case denied Lochridge and CTS's motion to dismiss.

Lochridge and CTS argue Ala. R. Civ. P. 4(b) requires a showing of good cause for a trial court to extend the 120-day time limit for effecting service on a defendant. They contend that absent any showing of good cause, Rule 4(b) requires that a trial court dismiss a plaintiff's claims for failure to timely perfect service. That is not the law in Alabama under Rule 4(b). It also is not the law in federal courts under Fed. R. Civ. P. 4(m).

Ala. R. Civ. P. 4(b) grants a trial court discretion to extend the time for a plaintiff to effect service on a defendant, even in the absence of a showing of "good cause." So does Fed. R. Civ. P. 4(m) – the rule from which Ala. R. Civ. P. "is borrowed." See Committee Comments to August 1, 2004 Amendment to Rule 4. This Court has recognized that discretion afforded to trial courts under Rule 4(b) as recently as December 18, 2020. See Varden Capital Properties, LLC v. Reese, 329 So. 3d 1230, 1231 (Ala. 2020).

Despite the obvious discretionary component of both Ala. R. Civ. P. 4(b) and Fed. R. Civ. P. 4(m), Lochridge and CTS ask this Court to read language into Rule 4(b) that does not exist and which would impose a requirement that a plaintiff make a showing of good cause in all

circumstances to avoid dismissal under Rule 4(b) for failure to timely serve a defendant. This Court cannot and should not engage in a form of judicial legislation by rewriting or rewording Rule 4(b) to include language and a requirement for a showing of good cause where none currently exists by the plain meaning of the language that actually appears in the rule. See DeKalb County LP Gas Co., Inc. v. Suburban Gas, Inc., 729 So. 2d 270, 276 (Ala. 1998).

Despite initially denying the existence of any discretionary component of Rule 4(b) in the first part of their brief, Lochridge and CTS eventually acknowledge and concede that trial courts are afforded discretion to extend the time for service under Rule 4(b), but they argue that discretion is not "unbridled" and that the trial court's extension of time in this case for Tombrella to effect service on them is an example of an exercise of unbridled discretion. The hyperbole/exaggerations Lochridge and CTS utilize in their brief do not accurately represent the facts, circumstances, or contents of the record in this case or the law that applies to it. This case does not present any "extreme" or "egregious" situation or circumstance in which the trial court's discretionary decision to extend Tombrella's time to serve Lochridge and CTS and its denial of

their motion to dismiss threatens the foundation or purpose of, or the policy behind, Rule 4(b).

Tombrella does not argue that a trial court's discretion under Rule 4(b) to extend the time for service is unbridled or unlimited. A non-exhaustive list of circumstances may serve to justify a trial court exercising its discretion to extend the time for serving a defendant under Rule 4(b) even in the absence of any showing of good cause. See Lepone-Dempsey, 476 F.3d at 1282. Federal courts have consistently observed and reiterated that legal reality by applying that discretion and affirming trial courts' use of it for over 20 years since Fed. R. Civ. P. 4 was amended in 1993 to include Rule 4(m).

The record before the trial court when it denied Lochridge and CTS's motion to dismiss does not reflect an exercise of unbridled discretion with no supporting reason or circumstance for the trial court's discretionary extension of time to effect service on those defendants. Lochridge and CTS's assertions to the contrary are flatly contradicted by the contents of the record. The trial court's discretion to extend the time for Tombrella to effect service on Lochridge and CTS under Rule 4(b) was exercised pursuant to, and was supported by, ample facts, evidence, and

circumstances reflected in the record. Courts addressing this issue and context have recognized the specific types of facts, evidence, and circumstances that were in the record before the trial court as sufficient to support a discretionary extension of time to effect service on a defendant under Rule 4.

The record shows Lochridge and CTS, and their counsel, had notice of the lawsuit and the claims Tombrella had asserted against them as early as November 6, 2019 – 76 days after Tombrella filed her Complaint – when counsel currently representing Lochridge and CTS in this case filed a Notice of Appearance with the trial court. (C. 236-37). The record also shows that Lochridge and CTS, and their counsel, received notice of subsequent filings in the lawsuit on December 10, 2019 – 110 days after Tombrella filed her Complaint. (C. 255-58). Pursuant to Ala. Code § 6-5-410 (1975), the two-year limitations period for Tombrella to assert viable wrongful death claims against Lochridge and CTS expired on August 25, 2019. (C. 29-46). If the trial court had dismissed Tombrella's claims against Lochridge and CTS without prejudice pursuant to Rule 4(b) after Lochridge and CTS filed their motion to dismiss on June 22, 2020, Tombrella would have been foreclosed from refiling her lawsuit and

reasserting her claims against Lochridge and CTS because the limitations period had expired by that time. (C. 29-46, 540-48). Those are both circumstances and reasons which, standing alone, courts addressing this issue and context have recognized as sufficient to justify a trial court's discretionary extension of the time limit for effecting service on a defendant under Rule 4.

Additional circumstances reflected in the record that supported the trial court's discretionary extension of Tombrella's time limit to effect service on Lochridge and CTS include the fact that:

(1) the address listed for the registered agent for service of process for CTS in the Alabama Secretary of State business entity database upon which Tombrella attempted to effect service of process from August 22, 2019 through May 7, 2020 was an old address that was incorrect and which CTS had not updated with the Alabama Secretary of State (C. 567-68);

(2) Tombrella's initial representative counsel withdrew from the case on November 7, 2019 – 77 days after her Complaint was filed and 43 days before the 120-day time limit for effecting service was set to expire (C. 239-40);

(3) Tombrella went unrepresented by counsel from November 7, 2019 to February 8, 2020 – a 93-day time period during which the 120-day time limit for effecting service on Lochridge and CTS under Rule 4(b) expired (C. 239-40, 266-68);

(4) Tombrella, as the personal representative of the estate of a decedent in a wrongful death case, was not permitted to proceed with or continue to pursue her wrongful death action

against Lochridge and CTS during the 93-day period when she was not represented by counsel because Alabama law does not allow a non-attorney executrix or personal representative in a wrongful death action to proceed, or represent the interests of an estate, *pro se* (See Ex parte Ghafary, 738 So. 2d 778 (Ala. 1998); (C. 262-63));

(5) after Tombrella's initial attempts to effect service on Lochridge and CTS, she again attempted to serve Lochridge and CTS on May 7, 2020, May 18, 2020, and June 16, 2020 by filing alias summonses and attempting service by certified mail issued by the clerk (C. 10-13, 361, 462, 516-17, 538);

(6) for some inexplicable reason, the clerk did not immediately issue the alias summonses and copies of Tombrella's Complaint to Lochridge and CTS pursuant to Tombrella's May 7, 2020 and May 18, 2020 filings and requests for re-attempted service, and waited until June 16, 2020 to issue the alias summonses and copies of Tombrella's Complaint to Lochridge and CTS by certified mail (C. 493-95); and

(7) Tombrella successfully perfected service on Lochridge and CTS on June 22, 2020 before they filed their motion to dismiss. (C. 549-50, 558-59).

All of the aforementioned facts, evidence, and circumstances were evident from and were contained in the record before the trial court when it denied Lochridge and CTS's motion to dismiss. Considered together, they constitute a showing "good cause" as to why an extension of time for Tombrella to effect service on Lochridge and CTS was warranted and granted by the trial court. They unquestionably constitute more-than-sufficient factors, circumstances, and reasons supporting the trial court's

exercise of its discretion to extend the time for Tombrella to effect service on Lochridge and CTS in this context under Rule 4(b). Accordingly, the trial court's July 21, 2021 Order denying Lochridge and CTS's motion to dismiss is due to be affirmed.

ARGUMENT

I. The question certified by the trial court for interlocutory appeal does not accurately state the issue to be decided by this Court or the events reflected in the record, and this Court should reframe/reword the certified question to accurately state the issue on appeal.

As an initial matter, Lochridge and CTS's Petition should not have been granted by this Court. This Ala. R. App. P. 5 interlocutory appeal should not have been accepted. This Court has stated that "Rule 5 is not a vehicle by which to obtain review of 'significant and unresolved *factual* issues.'" Gowens v. Tys. S. ex rel. Davis, 948 So. 2d 513, 530 (Ala. 2006) (quoting Spain v. Brown & Williamson Tobacco Corp., 872 So. 2d 101, 104 (Ala. 2003)) (emphasis in original). That is because "an interlocutory order should be certified for appeal under Rule 5 only 'when that order involves a controlling *question of law* as to which there is substantial ground for difference of opinion, and when an immediate appeal from the order would materially advance the ultimate termination of the litigation

and ... would avoid protracted and expensive litigation.'" Gowens, 948 So. 2d at 530 (quoting Ex parte Liberty Nat'l Life Ins. Co., 825 So. 2d 758, 762 (Ala. 2002)) (emphasis in original).

Moreover, "'Rule 5 does not apply in situations that involve application of law to facts or factual issues that are so one-sided that it can be said that 'as a matter of law' those issues can be decided only one way.'" Mid-Century Ins. Co. v. Watts, 323 So. 3d 39, 44-45 (Ala. 2020) (quoting Once Upon a Time, LLC v. Chappelle Props., LLC, 209 So. 3d 1094, 1106-07 (Ala. 2016) (Murdock, J., dissenting)). Permissive appeals are "intended, and should be reserved, for situations in which the court of appeals can rule on a pure, controlling question of law without having to delve beyond the surface of the record in order to determine the facts." McFarlin v. Conseco Servs., LLC, 381 F.3d 1251, 1259 (11th Cir. 2004).

The briefs submitted in this appeal show the facts related to the Rule 4(b) issues before this Court are disputed, and those factual issues are significant and unresolved. They are by no means undisputed. Lochridge and CTS admit in their brief that the issues in this appeal are "intertwined with the facts pertinent to service." (See Brief of Appellants, p. 1 n. 1). Additionally, the issues and arguments raised by Lochridge and

CTS, and this appeal in general, would have this Court to delve well-beyond the surface of the record in order to determine the facts. McFarlin, 381 F.3d at 1259.

There also is not a "substantial ground for difference of opinion" regarding the authority conferred to trial courts pursuant to Rule 4(b). The language of the rule is clear and unambiguous, as is its plain meaning. Federal courts interpreting the federal version of Rule 4(b) from which Rule 4(b) is derived, Fed. R. Civ. P. 4(m), have consistently recognized the discretionary authority that the time-limit-for-service section of Rule 4 bestows upon trial courts in the context presented in this case. Lochridge and CTS acknowledge that discretionary authority, and for many reasons this matter is not the proper subject of an interlocutory appeal pursuant to Rule 5. It should be summarily dismissed or denied.

However, if this Court chooses to consider this appeal, it should reframe or reword the certified question that has been submitted to it. This Court is permitted to reframe and reword questions certified by trial courts for interlocutory appeals pursuant to Ala. R. App. P. 5. See Ala. Powersport Auction, LLC v. Wiese, 143 So. 3d 713, 720 n. 4 (Ala. 2013)

(citing Okeke v. Craig, 782 So. 2d 281, 282 (Ala. 2000)) ("This Court has reworded controlling questions of law framed by a trial court for permissive appeal pursuant to Rule 5 before.").

The question certified by the trial court was drafted entirely by the Appellants and rubber-stamped and certified without alteration by the trial court. (C. 871-72, 878-81, 884-87). It misstates the issue this Court must decide in this appeal if it chooses to render any opinion. It also recites incorrectly the facts, evidence, and circumstances that were present before the trial court when it entered its July 21, 2021 Order denying Lochridge and CTS's motion to dismiss.

The question before this Court is not whether the trial court has jurisdiction over Lochridge and CTS. By denying Lochridge and CTS's motion to dismiss on July 21, 2021, the trial court effectively asserted jurisdiction over them and, after considering the contents of the record before it, exercised the discretionary authority afforded it under Rule 4(b) and implicitly granted Tombrella an extension of time to effect service on Lochridge and CTS with retroactive effect, which is a common occurrence in federal courts. (C. 841). Therefore, the question actually presented for this Court to decide is whether, based upon the contents of the record

when the trial court entered its Order on July 21, 2021, the trial court abused its discretion by extending the 120-day service period under Rule 4(b) so Lochridge's effectuation of service on Lochridge and CTS on June 22, 2020 was valid and denying Lochridge and CTS's motion to dismiss.

The statements in the trial court's certified question that there was "no follow up or subsequent attempts at service until June of 2020" and "service was not attempted again ... until June 22, 2020" are incorrect and not accurate. (C. 884-87). The record plainly shows Tombrella attempted to serve Lochridge and CTS on May 7, 2020 and May 18, 2020 through the clerk by certified mail prior to their eventual service on June 22, 2020. (C. 10-11, 361, 462). The statement in the trial court's certified question that "there was no requested extension of time to perfect service by Plaintiff's ... present counsel" is also not accurate. (C. 884-87). Tombrella and her counsel's argument that the trial court use the "broad discretion" afforded it under Rule 4(b) to "enlarge time periods" for serving Lochridge and CTS was, in effect, a request for an extension of time which the trial court granted when it entered its July 21, 2021 Order denying Lochridge and CTS's motion to dismiss. (C. 569, 577, 583, 841).

Due to the numerous incorrect statements of law, facts, evidence, and circumstances contained in the question certified by the trial court for this Court to decide in this interlocutory appeal, if this Court chooses to accept this appeal and render any opinion in it, the certified question is due to be reframed and reworded as noted herein.

II. The wording of Ala. R. Civ. P. 4(b) and the plain meaning of the language actually contained in the rule do not contemplate or impose a mandatory showing of good cause by a plaintiff to justify an extension of time for service.

Under the guise of asking this Court to interpret and clarify Rule 4(b), Lochridge and CTS attempt to have this Court improperly read and insert a "good cause" requirement into the language of Rule 4(b) where none exists with respect to the discretion trial courts are afforded to *sua sponte* extend the time for service. There is no "crack left by the plain language of the rule" into which this Court can or should insert and impose a requirement of a showing of "good cause" where no such requirement exists. (See Brief of Appellants, p. 28). The plain language of Rule 4(b) is unambiguous and clear, and it does not state or imply any such requirement.

Lochridge and CTS utilize a tortured reading of Rule 4(b) and Alabama appellate court cases referencing Rule 4(b) in distinctly

different contexts to attempt to have this Court read language and requirements into Rule 4(b) which simply do not exist within the plain language of the rule or its plain meaning. Their arguments and positions are not supported by cases from Alabama appellate courts addressing Rule 4(b) or cases from appropriate federal courts addressing the rule of civil procedure from which Rule 4(b) originates and is derived, Fed. R. Civ. P. 4(m).

Rule 4(b) reads as follows:

> **(b) Time Limit for Service.** If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, **the court**, upon motion or **on its own initiative**, after at least fourteen (14) days' notice to the plaintiff, **may** dismiss the action without prejudice as to the defendant upon whom service was not made or **direct that service be effected within a specified time**; **provided, however, that if the plaintiff shows good cause for the failure to serve the defendant, the court shall extend the time for service for an appropriate period**. This subdivision does not apply to fictitious-party practice pursuant to Rule 9(h) or to service in a foreign country.

Ala. R. Civ. P. 4(b) (emphasis added). Rule 4(b) "is borrowed from Fed. R. Civ. P. 4(m). The text is taken from the federal rule, except for the provisions for 14 days' notice and for fictitious party practice." Committee Comments to August 1, 2004 Amendment to Rule 4.

Fed. R. Civ. P. 4(m) reads as follows:

> **(m) Time Limit for Service.** If a defendant is not served within 90 days after the complaint is filed, **the court**--on motion or **on its own** after notice to the plaintiff--**must** dismiss the action without prejudice against that defendant or **order that service be made within a specified time**. **But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.** This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

Fed. R. Civ. P. 4(m) (emphasis added). There are not "several differences" between the language and plain meaning of the words contained in Fed. R. Civ. P. 4(m) and Ala. R. Civ. P. 4(b) with respect to the issues that are actually involved in this appeal, as Lochridge and CTS incorrectly contend.

Both Rule 4(b) and Rule 4(m) grant trial courts discretion to extend the time to effect service on a defendant and do not mandate dismissal in all instances when service is not made within the stated 120-day or 90-day time limit. In addition to that discretionary component, both rules also contain a mandatory component whereby trial courts "shall" or "must" extend the time for service "if the plaintiff shows good cause for the failure" to serve the defendant within the prescribed time limit for service. Both Rule 4(b) and Rule 4(m) require that "notice to the plaintiff" be provided before a trial court dismisses a plaintiff's claims for failure to

timely serve a defendant, with the only difference between the two rules being that Rule 4(b) specifies that trial courts are required to provide a plaintiff "at least fourteen (14) days' notice" prior to dismissal. Finally, as noted by the Committee Comments to the August 1, 2004 Amendment to Ala. R. Civ. P. 4, Rule 4(b) contains a provision related to fictitious party practice while Rule 4(m) does not contain any such provision. That is because fictitious party practice is not permitted in federal courts. See Richardson v. Johnson, 598 F.3d 734, 738 (11th Cir. 2010) ("As a general matter, fictitious-party pleading is not permitted in federal court.") (citations omitted).

The purpose of the Alabama Rules of Civil Procedure is stated in Rule 1(c), which says, "[t]hese rules shall be construed and administered to secure the just, speedy and inexpensive determination of every action." Ala. R. Civ. P. 1(c). "[T]he just … determination of every action" is a vital component of the purpose of the rules of civil procedure in this state. Id. The Civil Rules Committee has clearly stated that "the policy of rules such as these is to disregard technicality and form in order that the civil rights of litigants may be asserted and tried on the merits." Ala. R. Civ.

P. 1 Committee Comments on the 1973 Adoption of the Alabama Rules of Civil Procedure.

Both this Court and the Alabama Court of Civil Appeals have stated that "the purpose of the Alabama Rules of Civil Procedure is to effect justice upon the merits of the claim and to renounce the technicality of procedure." See Simpson v. Jones, 460 So. 2d 1282, 1285 (Ala. 1984) (quoting Crawford v. Crawford, 349 So. 2d 65, 66 (Ala. Civ. App. 1977) and referencing Ala. R. Civ. P. 8) (quotation marks omitted); Hosey v. Seibels Bruce Group, South Carolina Ins. Co., 363 So. 2d 751, 753 (Ala. 1978) ("we ... should not permit an overly rigid enforcement of the rule to inhibit the fundamental policy of the rules of Civil Procedure to disregard technicality and form in order that the civil rights of litigants may be asserted and tried on the merits."); McKelvin v. Smith, 85 So. 3d 386, 389 (Ala. Civ. App. 2010) (quoting Simpson, 460 So. 2d at 1285).

Lochridge and CTS aim to have this Court dismiss the claims against them based upon an alleged procedural technicality the trial court refused to endorse, rather than have the claims asserted against them adjudicated on the merits. Such an outcome directly contradicts the stated policy and purpose of the Alabama Rules of Civil Procedure.

Reversal of the trial court's July 21, 2021 Order denying Lochridge and CTS's motion to dismiss would likewise contradict the stated policy and purpose of the rules of civil procedure, including Rule 4(b), because it would effectuate a dismissal based upon on a procedural technicality to avoid an adjudication of the merits of Tombrella's claims and Lochridge and CTS's defenses.

As recently as December 18, 2020, this Court has acknowledged Rule 4(b) as "requiring service to be accomplished within 120 days of the filing of a complaint but giving trial courts discretion to extend that deadline." Varden Capital Properties, 329 So. 3d at 1231 (emphasis added). This Court's statement in Varden Capital Properties that Rule 4(b) gives "trial courts discretion to extend" the 120-day time limit for effecting service acknowledges the dual discretionary/mandatory components of Rule 4(b) which allow trial courts to extend the time limit for service – one context which requires a showing of good cause if and when a trial court provides notice it is contemplating a dismissal, and another separate and distinct context which does not require a showing of good cause.

Lochridge and CTS improperly attempt to link the 14-day notice requirement for dismissal under Rule 4(b) to the discretionary component of the rule that allows trial courts to extend the time limit for service, even in the absence of a showing of good cause. The 14-day notice provision in Rule 4(b) is tied to a trial court's contemplation of dismissal of an action without prejudice for failure to perfect service on a defendant. While it has been noted that one purpose of the 14-day notice requirement in Rule 4(b) "is to give the plaintiff an opportunity to show 'good cause' to extend the time for service," Moffett v. Stevenson, 909 So. 2d 824, 826-27 (Ala. Civ. App. 2005), that stated partial purpose of the 14-day notice requirement does not strip trial courts of the discretion they are afforded under Rule 4(b) to extend the time for service even in the absence of a showing of good cause.

The 14-day notice requirement is connected, as articulated by this Court and the Alabama Court of Civil Appeals, to a trial court's contemplation of dismissal of a plaintiff's claims and the mandatory section of Rule 4(b) whereby a trial court "shall" extend the time for service if good cause is shown by the party attempting to obtain service. See Moffett, 909 So. 2d at 826-27; Moore v. Ala. Dept. of Corrections, 60

So. 3d 932 (Ala. Civ. App. 2010) (relating 14-day notice requirement in Rule 4(b) to trial court's dismissal of an action, not exercise of its discretion to extend service); Voltz, 148 So. 3d 425 (relating 14-day notice requirement in Rule 4(b) to trial court's dismissal of an action, not exercise of its discretion to extend service); Guthrie v. Ala. Dept. of Labor, 160 So. 3d 815 (Ala. Civ. App. 2014) (relating 14-day notice requirement in Rule 4(b) to trial court's dismissal of an action, not exercise of its discretion to extend service). The 14-day notice requirement is not connected to, and has never been articulated as being connected to, the discretionary section of Rule 4(b) whereby a trial court "on its own initiative, ... may direct that service be effected within a specified time." Ala. R. Civ. P. 4(b). The "good cause" showing is not required for a trial court's purely discretionary decision to extend the time for serving a party "on its own initiative" under Rule 4(b). Id.

Neither this Court nor Lochridge and CTS can contort the language of Rule 4(b) and the Alabama Court of Civil Appeals' decision and opinion in Moffett (or any other Alabama decision cited by the Appellants) to rewrite Rule 4(b) and the plain meaning of the language in it to read and mandate that "without ... a showing [of good cause], dismissal is merited."

(See Brief of Appellants, pp. 20-21). That is not what the plain, unambiguous language contained in Rule 4(b) says or means under any reasonable construction or interpretation.

This Court has repeatedly emphasized the following with respect to judicial construction and interpretation:

> "'Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect.'"

Blue Cross & Blue Shield of Alabama, Inc. v. Nielsen, 714 So. 2d 293, 296 (Ala. 1998) (quoting IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992)). Even where a case "involves a rule of civil procedure and not a statute, the same principle applies." Moffett, 909 So. 2d at 826 (citing Lewis v. State, 889 So. 623, 665 (Ala. Crim. App. 2003)).

This Court has clearly stated that "'[i]t is not proper for a court to read into the statute something which the legislature did not include ...'" City of Pinson v. Utilities Bd. Of City of Oneonta, 986 So. 2d 367, 373 (Ala. 2007) (quoting Noonan v. East-West Beltline, Inc., 487 So. 2d 237, 239 (Ala. 1986)); see also Bessie v. Obstetrics & Gynecology Assocs. of

Northwest Ala., P.C., 828 So. 2d 280, 284 (Ala. 2002) ("This Court ... will not judicially insert exceptions [in]to a statute whose language is clear."). The same principle applies to this Court's analysis of a rule of civil procedure like Rule 4(b). See Board of Comm'rs of Ala. State Bar v. Jones, 291 Ala. 371, 379 (Ala. 1973) ("where the charge sets forth a course of conduct which has been dealt with by a specific rule, such rule establishes the standard to be applied, and we will not rewrite or otherwise modify such standard.").

Lochridge and CTS attempt to cast doubt on the clarity and meaning of Rule 4(b) and invite this Court to rewrite Rule 4(b) under the guise of judicial construction or interpretation. This Court should be mindful of the following guidance it once provided and should reject the Appellants' improper invitation to engage in a form of judicial legislation:

> It is true that when looking at a statute we might sometimes think that the ramifications of the words are inefficient or unusual. However, it is our job to say what the law is, not to say what it should be. Therefore, only if there is no rational way to interpret the words as stated will we look beyond those words to determine legislative intent. To apply a different policy would turn this Court into a legislative body, and doing that, of course, would be utterly inconsistent with the doctrine of separation of powers.

DeKalb County LP Gas Co., 729 So. 2d at 276. Rule 4(b) does not contain a universal requirement that a plaintiff must make a showing of good cause in order for a trial court to justify extending the time to serve a defendant beyond the stated 120-day time limit. The language that actually appears in the rule does not state any such requirement, and the plain meaning of the language in the rule does not contemplate or suggest any such requirement. Trial courts in Alabama always have and retain discretion to extend the time for service under Rule 4(b) if they determine the particular facts and circumstances of a case justify such an extension. Lochridge and CTS's arguments to the contrary are unavailing, and they are not supported by any legitimate legal authority.

Lochridge and CTS's citation to and reliance upon this Court's no-opinion affirmance in Coleman v. Smith, 987 So. 2d 1126 (Ala. 2007) has no relevance to this appeal or influence on this Court's decision. Their attempt to have this Court reverse the trial court's denial of their motion to dismiss pursuant to that no-opinion affirmance reveals how truly weak and unsupportable the Appellants' arguments and positions are in this appeal.

As noted, Coleman was a no-opinion affirmance by this Court pursuant to Ala. R. App. P. 53(a)(1) and 53(a)(2)(F). It means absolutely nothing, is of no use, and has no value. It has no precedential, persuasive, or any other type of value. Rule 53 of the *Alabama Rules of Appellate Procedure* governs "'No Opinion' Cases of the Supreme Court and the Court of Civil Appeals." Ala. R. App. P. 53. Rule 53 specifically states the following: "'No Opinion Affirmance Not Precedent. An order of affirmance issued by the Supreme Court or the Court of Civil Appeals by which a judgment or order is affirmed without an opinion, pursuant to section (a), shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrine of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar." Ala. R. App. P. 53(d) (emphasis added).

None of the listed exceptions in Ala. R. App. P. 53(d) applies to this case or context. Accordingly, the Coleman case and the no-opinion affirmance of the Lauderdale County Circuit Court's ruling in that case has "no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state," including this Court.

Ala. R. App. P. 53(d). That legal reality and principle is well-established in Alabama. See Bradberry v. Carrier Corp., 86 So. 3d 973, 979 n. 6, 987 (Ala. 2011); Wells v. Storey, 792 So. 2d 1034, 1042 n. 4 (Ala. 1999). Moreover, Coleman involved affirming a trial court's decision to grant a motion to dismiss, not reversal of a trial court's decision to deny a motion to dismiss, which are markedly different contexts.

Lochridge and CTS's reliance on this Court's decision in Precise v. Edwards, 60 So. 3d 228 (Ala. 2010) is equally concerning and problematic. Lochridge and CTS argue that imposition of an arbitrary limitation on the discretion of trial courts to extend the time for service under Rule 4(b) is "supported by the language used and logic employed by this Court" in Precise and that "the situation presented and the reasoning of the Court [in Precise] are instructive here." (See Brief of Appellants, pp. 23-24). That is not remotely accurate or true.

Precise involved this Court's analysis of a trial court's dismissal with prejudice of plaintiffs' claims at the summary judgment stage based upon a finding that the record showed the plaintiffs lacked a *bona fide* intent to effect service on the defendants prior to expiration of the applicable statute of limitations. Precise, 60 So. 3d at 230-34. Precise did

not involve any dismissal or determination based upon Rule 4(b). Id. This Court expressly noted in Precise that dismissal of the plaintiffs' claims by the trial court and this Court's affirmance of that dismissal were based upon the issue of whether the plaintiffs timely "commenced" their action, noting "the summary judgment is premised on the plaintiffs' failure to commence the action for statute-of-limitations purposes; Rule 4(b) is immaterial to this analysis." Precise, 60 So. 3d at 234 (emphasis added). Precise had nothing to do with Rule 4(b), and it does not provide any insight or guidance in this appeal as to the issues before this Court. Additionally, footnote 4 to the Precise opinion, which is contained in a dissent written by Justice Cobb in an 8-1 decision to which she alone dissented, provides no context and, standing alone, is not an accurate statement of law and has no binding or persuasive effect on this Court.[2] Lochridge and CTS's reliance on that case is misplaced.

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[2] Lochridge and CTS cannot seem to decide whether they trust Justice Cobb's legal analysis and opinions enough to rely upon them or not. On one hand they criticize and disagree with her opinions and analysis in her dissent in Coleman because they do not support their arguments and positions in this appeal. On the other hand they turn around later in their brief and embrace Justice Cobb's incorrect, out-of-context statement regarding Rule 4(b) in the footnote of her dissent in Precise. The inconsistency of their treatment of Justice Cobb and her dissenting

There is not any "demonstrable interpretation by Alabama jurists since the 2004 amendment to Rule 4(b) that there is an interrelatedness between [Rule 4(b)]'s 120-day 'requirement' and a showing of good cause necessary to justify the trial court's discretion to extend that time limit," as Lochridge and CTS baldly contend. (See Brief of Appellants, p. 25). Alabama appellate courts have only noted that Rule 4(b) gives "trial courts discretion to extend" the 120-day time limit for effecting service on a defendant, acknowledging the dual discretionary/mandatory components of Rule 4(b) which allow trial courts to extend the time limit for service (Varden Capital Properties, 329 So. 3d at 1231), and that Rule 4(b) "allows for service of process ... in some instances beyond[ ] 120 days after the plaintiff filed its complaint." Ex parte East Ala. Mental Health-Mental Retardation Bd., Inc., 939 So. 2d 1, 5 n. 6 (Ala. 2006).

Under either the mandatory "good cause" section of Rule 4(b) or the discretionary section of Rule 4(b), Tombrella presented, and the record before the trial court contained, facts, evidence, and circumstances that were sufficient to justify the trial court's decision to extend the time for

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opinions and analyses should highlight even more the weak and unpersuasive nature of their arguments and positions in this appeal.

Tombrella to effect service on Lochridge and CTS and deny Lochridge and CTS's motion to dismiss. The trial court's July 21, 2021 Order is due to be affirmed.

III. The facts, evidence, and circumstances discernible from the record before the trial court were sufficient to justify the trial court's discretionary decision to extend Tombrella's time to effect service on Lochridge and CTS under Rule 4(b) and its decision to deny Lochridge and CTS's motion to dismiss.

Pursuant to the discretion afforded the trial court in this case under Rule 4(b), the trial court denied Lochridge and CTS's motion to dismiss and extended the time limit for Tombrella to effect service on them because circumstances presented by the record justified such an extension. Federal court decisions analyzing, interpreting, and applying Fed. R. Civ. P. 4(m), the federal counterpart to Rule 4(b) from which Rule 4(b) is derived, overwhelmingly support a decision by this Court to affirm the trial court's July 21, 2021 Order denying the Appellants' motion to dismiss.

It is well-settled that "federal decisions construing the Federal Rules of Civil Procedure are persuasive authority in construing the Alabama Rules of Civil Procedure because the Alabama Rules were patterned after the Federal Rules." Ex parte Novus Utilities, Inc., 85 So.

3d 988, 996 (Ala. 2011) (citing Borders v. City of Huntsville, 875 So. 2d 1168 (Ala. 2003)). Ala. R. Civ P. 4(b) "is borrowed from Fed. R. Civ. P. 4(m). The text is taken from the federal rule, except for the provisions for 14 days' notice and for fictitious party practice." Committee Comments to August 1, 2004 Amendment to Rule 4. Accordingly, as Ala. R. Civ. P. 4(b) and Fed. R. Civ. P. 4(m) are essentially the same in terms of the issues before this Court because the 14-day notice provision and fictitious party practice language are immaterial to this Court's determination, appropriate federal decisions construing Fed. R. Civ. P. 4(m) are persuasive authority in construing and interpreting Ala. R. Civ. P. 4(b). Lochridge and CTS admit "that the federal cases are relevant when Alabama courts are analyzing the application of ARCP 4(b)." (See Brief of Appellants, p. 22).

The Eleventh Circuit Court of Appeals and Alabama federal district courts have articulated and embraced a construction, interpretation, and application of Fed. R. Civ. P. 4(m) (and consequently Ala. R. Civ. P. 4(b)) that is contradictory to that which Lochridge and CTS advocate in their brief. An overwhelming majority of federal courts interpret and apply Fed. R. Civ. P. 4(m) in a very different manner than Lochridge and CTS

urge this Court to interpret and apply Rule 4(b) in this case. This Court's decision in this appeal should be guided by the federal cases and decisions referenced below.

In Henderson v. U.S., 517 U.S. 654 (1996), the United States Supreme Court noted with respect to Fed. R. Civ. P. 4(m) – the federal rule from which Ala. R. Civ. P. 4(b) is derived – that "in 1993 amendments to the Rules, courts have been accorded discretion to enlarge the 120-day period 'even if there is no good cause shown.'" Henderson, 517 U.S. at 662-63 (citing Advisory Committee's Notes on Fed. R. Civ. P. 4, 28 U.S.C. App., p. 654). The Supreme Court stated in Henderson that "[t]he Federal Rules thus convey a clear message: Complaints are not to be dismissed if served within 120 days, or within such additional time as the court may allow." Id. at 663. It further noted that "the core function of service is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections." Id. at 672.

In 2005, the Eleventh Circuit Court of Appeals noted in Horenkamp v. Van Winkle And Co., Inc., 402 F.3d 1129 (11th Cir. 2005) that "[e]ven the Supreme Court, in *dicta*, concluded that the 1993 amendment to Rule

4 affords discretion to the district court to extend the time for service even in the absence of good cause." Horenkamp, 402 F.3d at 1132 (citing Henderson). The Eleventh Circuit then proceeded in Horenkamp to recognize and endorse that discretion afforded trial courts under Fed. R. Civ. P. 4(m), stating that "today, we join our sister circuits and hold that Rule 4(m) grants discretion to the district court to extend the time for service of process even in the absence of a showing of good cause." Id. The Eleventh Circuit further articulated in Horenkamp that "[i]n reviewing a district court's exercise of such discretion, we again look to the Advisory Committee Note to Rule 4(m) for guidance as to what factors may justify the grant of an extension of time for service of process in the absence of good cause," noting the exercise of a trial court's discretion to extend the time to effect service under Rule 4(m) could be justified "if the applicable statute of limitations would bar the refiled action" or "if the defendant is evading service or conceals a defect in attempted service." Id. at 1132-33 (citing Panaras v. Liquid Carbonic Industries Corp.,, 94 F.3d 338 (7th Cir. 1996) and Fed. R. Civ. P. 4(m) Advisory Committee Note to 1993 Amendments).

In 2007, the Eleventh Circuit again recognized a trial court's discretion under Rule 4(m), as articulated in Henderson and Horenkamp, to extend the time for a plaintiff to effect service on a defendant even where there has been no showing of good cause by the plaintiff. See Lepone-Dempsey, 476 F.3d at 1281-82. In acknowledging and reiterating that discretion afforded to trial courts, the Eleventh Circuit took an additional step in Lepone-Dempsey and held that under Rule 4(m), before dismissing a case for failure to timely effect service on a defendant, a trial court is required to first consider whether factors or circumstances exist which might justify extending the time limit for effecting service, even where there has been no showing of good cause:

> We agree with our sister circuits and hold that when a district court finds that a plaintiff fails to show good cause for failing to effect timely service pursuant to Rule 4(m), the district court must still consider whether any other circumstances warrant an extension of time based on the facts of the case. Only after considering whether any such factors exist may the district court exercise its discretion and either dismiss the case without prejudice or direct that service be effected within a specified time.

Lepone-Dempsey, 476 F.3d at 1282 (citing Panaras, 94 F.3d at 341; Thompson v. Brown, 91 F.3d 20, 22 (5th Cir. 1996); Espinoza v. United States, 52 F.3d 838, 841 (10th Cir. 1995); Petrucelli v. Bohringer &

Ratzinger, GMHB, 46 F.3d 1298, 1307-08 (3d Cir. 1995)). The Eleventh Circuit noted in Lepone-Dempsey that the list of circumstances that would support a trial court's discretionary extension of the time for service in the absence of a showing of good cause was "not an exhaustive list." Lepone-Dempsey, 476 F.3d at 1282; see also Brooks v. Knutson, 2021 WL 5181052, *1 (S.D. Ala. Nov. 8, 2021) (quoting Lepone-Dempsey and noting there is "'not an exhaustive list' of factors a court may consider" when deciding whether to grant discretionary extension in the absence of good cause).

Alabama federal district courts have followed Henderson, Horenkamp, and Lepone-Dempsey, noting that like Ala. R. Civ. P. 4(b), "Rule 4(m) has mandatory and discretionary components" with respect to a trial court's decision of whether to extend the time for a plaintiff to effect service on a defendant. See Boyd v. Koch Foods of Alabama, LLC, 2011 WL 6141064, *2 (M.D. Ala. Dec. 8, 2011). "'If good cause is present, the district court *must* extend time for service. If good cause does not exist, the court may, in its discretion, decide whether to dismiss the case without prejudice or extend time for service.'" Id. (quoting Thompson, 91 F.3d at 21 (emphasis in original)).

There are many examples of cases decided by the Eleventh Circuit and Alabama federal district courts where the same or similar circumstances as those present in this case were deemed sufficient to support a trial court's decision to deny a defendant's motion to dismiss and exercise its discretion and extend the time for a plaintiff to serve a defendant under Fed. R. Civ. P. 4(m) without any showing of good cause. In Horenkamp, the Eleventh Circuit addressed a case where it took the plaintiff five (5) months to effect service on the defendant, and the defendant filed a motion to dismiss the plaintiff's claims for failure to timely perfect service of process within the 120-day time limit prescribed by Rule 4(m). Horenkamp, 402 F.3d at 1130-31. Despite the plaintiff's failure to show good cause as to why the defendant had not been timely served, the trial court in Horenkamp excused the plaintiff's failure to timely perfect service on the defendant pursuant to the discretion afforded to the trial court under Rule 4(m) because the defendant had received notice of the lawsuit, had been properly (though belatedly) served with process, and a dismissal of the plaintiff's claims without prejudice pursuant to Rule 4(m) at that time would have prevented the

plaintiff from refiling her claims because the applicable statute of limitations had expired. Id.

The defendant in Horenkamp subsequently appealed the trial court's denial of its motion to dismiss the plaintiff's claims for failure to timely serve process on it to the Eleventh Circuit. Id. at 1131. On appeal, the Eleventh Circuit affirmed the trial court's denial of the defendant's motion to dismiss and the trial court's decision to extend the time for the plaintiff to effect service on the defendant, holding:

> In the instant case, the district court noted, in exercising its discretion to extend Horenkamp's time for filing, that if it were to dismiss her complaint, even without prejudice, her claim would be foreclosed because of the applicable statute of limitations. Noting that Van Winkle had notice of the suit and had now been properly served, the district court granted the extension of time to preserve Horenkamp's claim.
>
> We hold that the district court did not abuse its discretion in granting such an extension. Although the running of the statute of limitations does not require that a district court extend the time for service of process under the new rule, *see* Panaras, 94 F.3d at 341; Petrucelli, 46 F.3d at 1306, we agree with the district court that the circumstances of this case militate in favor of the exercise of the district court's discretion to do so.

Horenkamp, 402 F.3d at 1133.

The same factors and circumstances present in Horenkamp that justified affirmance of the trial court's denial of the defendant's motion

to dismiss in that case are present in this case. Lochridge and CTS, and their counsel, had notice of the lawsuit and the claims Tombrella had asserted against them as early as November 6, 2019 – 76 days after Tombrella filed her Complaint – and again on December 10, 2019 – 110 days after Tombrella filed her Complaint. (C. 236-37, 255-58). Pursuant to Ala. Code § 6-5-410 (1975), the two-year limitations period for Tombrella to assert viable wrongful death claims against Lochridge and CTS expired on August 25, 2019. (C. 29-46). If the trial court had dismissed Tombrella's claims against Lochridge and CTS without prejudice pursuant to Rule 4(b) when Lochridge and CTS filed their motion to dismiss on June 22, 2020, Tombrella would have been foreclosed from refiling her lawsuit and reasserting her claims against Lochridge and CTS because the applicable limitations period had expired. (C. 29-46, 540-48). Additionally, Tombrella, like the plaintiff in Horenkamp, had perfected service of process on Lochridge and CTS, albeit belatedly, prior to Lochridge and CTS filing their motion to dismiss. (C. 549-50, 558-59). Just as the Eleventh Circuit affirmed the trial court's denial of the defendant's motion to dismiss and its discretionary extension of the time for service in Horenkamp, this Court

should affirm the trial court's July 21, 2021 Order denying Lochridge and CTS's motion to dismiss.

In Goosby v. Briggs, 2021 WL 2405210 (M.D. Ala. June 11, 2021), the U.S. District Court for the Middle District of Alabama addressed a situation analogous to this case where a defendant was not served until 8-10 months after the plaintiff filed her complaint and moved to dismiss the plaintiff's claims under Rule 4(m) based on the plaintiff's failure to timely effect service. Goosby, 2021 WL 2405210 at *1. The trial court denied the defendant's motion to dismiss. Id. at *1-2. Noting its discretion under Rule 4(m) to extend the time for service even in the absence of good cause shown, the court in Goosby noted that factors and circumstances were present in the case which justified extending the plaintiff's time to perfect service on the defendant and denying the defendant's motion to dismiss. Id. at *2.

The factors and circumstances noted by the court in Goosby included the fact that: (1) the defendant, like Lochridge and CTS, had received notice of the lawsuit; (2) the defendant, like Lochridge and CTS, had been successfully served process; (3) as in this case, dismissal of the plaintiff's claims against the defendant without prejudice would have

been a *de facto* dismissal with prejudice with the plaintiff unable to refile her claims because the statute of limitations on her claims had expired; and (4) the fact that the defendant would not be prejudiced because the case, like this case, was only in the initial phases of discovery and had not progressed very far. Id.

As noted above, all of those same factors and circumstances were and are present in this case as shown by the record. Lochridge and CTS do not and cannot argue that they are or would be prejudiced by extending the time for service on them and denying their motion to dismiss. Just as the court in Goosby considered and applied factors and circumstances present in the record before it to justify a discretionary decision to extend the plaintiff's time for service in that case under Rule 4(m) and deny the defendant's motion to dismiss, the trial court in this case utilized the discretion afforded it under Ala. R. Civ. P. 4(b) to do the same. No showing of good cause by the plaintiff was required in Goosby, and it was not required in this case. The trial court's July 21, 2021 Order denying Lochridge and CTS's motion to dismiss is due to be affirmed. The trial court acted appropriately and well within its permitted discretion

pursuant to rule 4(b) when it extended the time for Tombrella to effect service on Lochridge and CTS and denied their motion to dismiss.

There are many other cases where Alabama federal district courts and the Eleventh Circuit have determined that exercise of a trial court's discretion to extend the time for service under Rule 4(m) and denial of a defendant's motion to dismiss was justified in the presence of facts, factors, and circumstances the same as, or similar to, those present in this case which were discernible from the record before the trial court. See Cabrera v. CMG Development LLC, 717 Fed. App'x 841 (11th Cir. 2017); Effs v. City of Miami, 2021 WL 6116643 (11th Cir. Dec. 27, 2021); In re Cutuli, 13 F.4th 1342 (11th Cir. Sept. 23, 2021); Benkovitch v. Village of Key Biscayne, Fla., 778 Fed. App'x 711 (11th Cir. 2019); Johnson v. Southern Nuclear Operating Co., 2008 WL 11375426 (N.D. Ala. Dec. 29, 2008) (adopted in full by Order in Johnson v. Southern Nuclear Operating Co., 2009 WL 10687793 (N.D. Ala. Feb. 9, 2009)); Will-Burn Recording & Publ'g Co. v. Universal Music Group Records, 2008 WL 4793291 (S.D. Ala. Nov. 4, 2008); Brooks, 2021 WL 5181052; Robinson v. Ala. State Univ., 2017 WL 2644069 (M.D. Ala. June 5, 2017) (adopted in full by Order in 2017 WL 2643615 (M.D. Ala. June 19, 2017));

Johnson v. City of Clanton, Ala., 2005 WL 1618556 (M.D. Ala. July 7, 2005); Todd v. City of LaFayette, 2013 WL 6050855 (M.D. Ala. Sept. 23, 2013); Tannehill v. Wilkie, 2021 WL 1624275 (S.D. Ala. Jan. 25, 2021) (adopted in full by Order in 2021 WL 794431 (S.D. Ala. Mar. 2, 2021)); Boyd, 2011 WL 6141064; Reeves v. Coosa Valley Youth Servs., 2010 WL 11613676 (N.D. Ala. Apr. 2, 2010).

The Eleventh Circuit has considered the fact that "opposing counsel had filed a notice of appearance on behalf of" unserved defendants as a factor and circumstance supporting a trial court's discretionary extension of time for service under Rule 4(m) because it indicated the defendants on whose behalf the notice of appearance was filed "were aware of the suit." See Cabrera, 717 Fed. App'x at 843. Opposing counsel in this case representing Lochridge and CTS filed a Notice of Appearance on the Appellants' behalf on November 6, 2019 – 76 days after Tombrella filed her Complaint. (C. 236-37). That Notice of Appearance plainly indicated Lochridge and CTS, and their counsel, had notice of and were aware of Tombrella's lawsuit and the claims asserted against them, and notice of the lawsuit "informs the calculus regarding discretionary extensions of time to effect … service." See Brooks, 2021 WL 5181052 at *4. Such notice

weighs in favor of a trial court exercising its discretion to extend the time for service under Ala. R. Civ. P. 4(b) just as it does under Fed. R. Civ. P. 4(m), and it justified the trial court's denial of Lochridge and CTS's motion to dismiss and its discretionary extension of the time for Tombrella to effect service on the Appellants.

Tombrella's change in counsel and her 93-day stint as a *pro se* litigant from November 7, 2019 to February 8, 2020 also justified the trial court's denial of Lochridge and CTS's motion to dismiss and its discretionary extension of time for Tombrella to effect service on them. (C. 239-40, 262-63, 266-68). During that 93-day time period Tombrella was unrepresented by counsel and was incapable of proceeding with her action or claims in any way, and the 120-day time limit for service under Rule 4(b) expired during that 93-day period. (C. 266-68). See Ghafary, 738 So. 2d 778 (Ala. 1998) (holding under Alabama law a non-attorney executrix or personal representative in a wrongful death action is not permitted to proceed or represent the interests of an estate *pro se*). Alabama federal district courts have recognized that "a change in ... counsel" is a factor that supports a trial court's discretionary extension of the time for service under Fed. R. Civ. P. 4(m). See Reeves, 2010 WL

11613676 at *1. Alabama federal district courts have also recognized and held that a plaintiff's status as a *pro se* litigant is a factor that weighs in favor of a trial court exercising its discretion under Rule 4(m) to extend the time for a plaintiff to effect service on a defendant. See Boyd, 2011 WL 6141064 at *2; Todd, 2013 WL 6050855 at *2; Tannehill, 2021 WL 794431 at *9.

Lochridge and CTS's emphasis on an alleged lack of diligence or urgency on the part of Tombrella and her counsel with respect to serving process on them does not merit reversal of the trial court's discretionary decision to deny their motion to dismiss and extend the time for Tombrella to effect service on them. Even in cases where "the plaintiff's service efforts are less than exemplary" and "desultory," or show "extreme deficiencies in the prosecution of th[e] action," courts have determined that discretionary extensions of time for service under Rule 4(m) were appropriate. See Brooks, 2021 WL 5181052 at *4; Tannehill, 2021 WL 794431 at *9.

Lochridge and CTS make much of the length of time that passed in this case between the filing of Tombrella's Complaint on August 22, 2019 and when Tombrella successfully served both Appellants on June 22,

2020. That time period, which Lochridge and CTS represent as 305 days, is actually more like 212 days because of the 93-day time period between from November 7, 2019 to February 8, 2020 when Tombrella was unrepresented by counsel and was incapable of proceeding with her action or claims in any way. (C. 239-40, 262-63, 266-68). See Ghafary, 738 So. 2d 778 (Ala. 1998). If that inoperative time period is excused (and it should be), Tombrella actually perfected service on Lochridge and CTS 92 days after the 120-day time limit for service under Rule 4(b).

Whether the time period from the filing of Tombrella's Complaint to the successful service of process on Lochridge and CTS was 212 days or 305 days, Lochridge and CTS characterize that delay as "extreme" and "egregious," without citing any legal authority which articulates or imposes a limit on the length of time a trial court may extend the time for service under Rule 4(b). There is no such authority because Rule 4(b) does not state or impose any limit on the length of time trial courts are permitted to extend the time for service under that rule. The Eleventh Circuit has previously addressed the same argument from a defendant and rejected it:

> On appeal, Cutuli focuses on the length of the extension the bankruptcy court granted; as he calculates it, the bankruptcy

> court permitted service of process 845 days after the filing of the complaint. In isolation, that does seem like a long time. But Cutuli does not cite a single authority that sets a time limit on the bankruptcy court's extension discretion, much less one that would control this Court's decision. Nor are we aware of any. See Fed. R. Civ. P. 4(m) (providing only that the court may "order that service be made within a specified time").
>
> More to the point, the abuse of discretion standard requires an examination of the bankruptcy court's reasons for exercising its discretion to grant an extension, rather than an isolated focus on the window's length. ...

Cutuli, 13 F.4th at 1347. The length of time between Tombrella filing her Complaint and effecting service on Lochridge and CTS and the trial court's extension or excuse of it is irrelevant to this Court's analysis regarding whether the record showed circumstances that have been recognized as sufficient to justify a trial court's extension of time for service. Just as federal courts are afforded a "great deal of discretion" under Fed. R. Civ. P. 4(m) "in extending the time for service of process," trial courts in Alabama are afforded the same broad discretion and wide latitude under Rule 4(b). See Robinson, 2017 WL 2644069 at *1 (citing Lepone-Dempsey, 476 F.3d at 1281).

Even if the time period was 305 days instead of 212 days, the trial court still would have been acting within the discretion afforded it under

Rule 4(b) by extending the time for Tombrella to effect serving on Lochridge and CTS. Alabama federal courts and the Eleventh Circuit have permitted such discretionary extensions under Fed. R. Civ. P. 4(m) for similar and even much longer delays. See Goosby, 2021 WL 2405210 (granting discretionary extension of time under Rule 4(m) when there was an 8-10 month delay effecting service); Johnson, 2008 WL 11375426 (granting discretionary extension where there was a 10-month (311-day) delay effecting service); Robinson, 2017 WL 2644069 (granting discretionary extension where there was a 6-month delay effecting service); Tannehill, 2021 WL1624275 (granting discretionary extension where there was a 10-month ("over 300 days") delay effecting service); Boyd, 2011 WL 6141064 (granting discretionary extension where there was a 15-month delay effecting service); Cabrera, 717 Fed. App'x 841 (granting discretionary extension where there was a 10-month delay effecting service); Effs, 2021 WL 6116643 (granting discretionary extension where there was a 10-month delay effecting service); Cutuli, 13 F.4th 1342 (granting discretionary extension where there was an 845-day delay effecting service)

Lochridge and CTS's criticisms of the actions (or inactions) of Tombrella's current and former counsel with respect to the delay in effecting service on them also do not represent legitimate or sufficient grounds for reversing the trial court's denial of their motion to dismiss or holding the trial court abused its discretion by extending the time for service. The Eleventh Circuit has noted that "errors of counsel" that contribute to a failure or delay in effecting service on a defendant, including those considered "inadvertent," "while sloppy, generally do[ ] not justify the extreme sanction of dismissal ..." Effs, 2021 WL 6116643 at *4 (citation omitted). Alabama federal courts have likewise recognized that "in some instances, including circumstances where the 120 days time for service runs because of error or mistakes by plaintiff's counsel, it militates in favor of the exercise of a district court's discretion" to extend the time for service. See Johnson, 2005 WL 1618556 at *4 (citation omitted).

Even if this Court were to not consider Tombrella's appeal to the trial court that it use the "broad discretion" afforded it under Rule 4(b) to "enlarge time periods" for serving Lochridge and CTS as a request for an extension of time, a failure on the part of Tombrella to formally or

expressly request an extension of time would not support reversal of the trial court's denial of Lochridge and CTS's motion to dismiss. (C. 569, 577, 583, 841). The language of Rule 4(b) does not state or imply any requirement that a plaintiff must first request an extension of the time limit for service before a trial court may grant one in its discretion. Lochridge and CTS's arguments to the contrary are yet another improper attempt to rewrite the plain, unambiguous language contained in Rule 4(b) and have this Court engage in the same brand of unpermitted judicial legislation.

Lochridge and CTS's argument that the trial court was required to explicitly state and explain the reasoning for its decision to deny their motion to dismiss and extend the time for effecting service on them in a formal, written order has no foundation or supporting legal authority. That is why they do not cite any supporting authority for that proposition. All that is required of trial courts under Rule 4(b), as illustrated by federal courts when applying Fed. R. Civ. P. 4(m), is that trial courts consider whether facts, evidence, factors, or circumstances are evident or present in the record that would support a discretionary extension of the time for service. Trial courts are not required to delineate

or explain their application of that analysis or the rationale for their decision(s) in a formal written order.

The actions of the trial court in this instance plainly show that it did not find Lochridge and CTS's arguments in their motion to dismiss compelling enough to impose the harsh sanction of dismissal on Tombrella and her claims against the Appellants. The trial court's decision to deny Lochridge and Tombrella's motion to dismiss also shows that it chose to exercise the broad discretion afforded it under Rule 4(b) to extend the time for Tombrella to effect service on Lochridge and CTS because circumstances were present which militated against dismissal and in favor of granting such an extension.

Lochridge and CTS assert that expiration of the applicable statute of limitations on Tombrella's claims against them and her inability to refile those claims is not as important or compelling of a factor in this case as it would be in others, "given that it would not bar the Plaintiff's entire action, which will remain pending against several Defendants who were served in a timely manner." (See Brief of Appellants, p. 33). Such a cavalier approach to consideration of what is perhaps the most compelling factor in the limitations period on a plaintiff's claims expiring

and the irreparable prejudice dismissal would cause to a plaintiff who, like Tombrella, would be unable to refile her claims has been strongly denounced by Alabama federal courts addressing this context:

> The plaintiff also argues she should receive additional time to serve the defendant because, were her claim against him to be dismissed without prejudice pursuant to Rule 4(m), the statute of limitations would bar any re-filed claim. (Doc. 69 at 7). The defendant counters that "the weight accorded this factor should be significantly diminished" because his dismissal will cause the plaintiff no "significant harm," in that this action will continue against two other defendants and in that a separate wrongful death action against different defendants remains pending in Tennessee. (Doc. 70-1 at 8). The defendant provides neither legal authority nor reasoned argument for the remarkable proposition that a wrongful death plaintiff's permanent loss of a claim against one defendant on limitations grounds is inconsequential for Rule 4(m) purposes so long as she can still pursue claims against other defendants for their separate conduct. Absent such authority or reasoning, the Court cannot accept the defendant's position.

Brooks, 2021 WL 5181052 at *4. Lochridge and CTS, like the defendant in Brooks, do not provide legal authority or reasoned argument for their identical proposition to this Court. That argument should be rejected.

As illustrated in the preceding paragraphs of this section of Tombrella's Brief, the record before the trial court at the time it denied Lochridge and CTS's motion to dismiss on July 21, 2021 contained ample evidence as well as numerous circumstances, factors, and facts which

supported and justified the trial court's decision to deny the Lochridge and CTS's motion to dismiss and its discretionary decision to extend the 120-day service period in this case to effect service on Lochridge and CTS under Ala. R. Civ. P. 4(b). The trial court's July 21, 2021 Order denying Lochridge and CTS's motion to dismiss is due to be affirmed.

IV. The federal decisions cited and relied upon by Lochridge and CTS are not binding or persuasive authority, and they do not accurately represent how the vast majority of federal courts interpret Fed. R. Civ. P. 4(m).

In addition to the Eleventh Circuit, "a majority of the other circuits that have considered the effect of the 1993 amendment to Rule 4 (Fed. R. Civ. P. 4(m)) have held that the 1993 amendment permits a district court to exercise discretion under Rule 4 to extend the time for service of process, even where the plaintiff has not shown good cause for his failure." Horenkamp, 402 F.3d at 1132 (citing Mann v. American Airlines, 324 F.3d 1088 (9th Cir. 2003); Panaras, 94 F.3d at 340; Petrucelli, 46 F.3d 1298; Thompson, 91 F.3d 20; Espinoza, 52 F.3d 838). The Second Circuit Court of Appeals has likewise held that Fed. R. Civ. P. 4(m) grants trial courts discretion to extend the time for a plaintiff to effect service on a defendant beyond the stated 120-day period even in the absence of a showing of "good cause" by the plaintiff. See Zapata v.

City of New York, 503 F.3d 192 (2nd Cir. 2007). "Only the Fourth Circuit holds to the contrary." Horenkamp, 402 F.3d at 1132 n. 4. That is why Lochridge and CTS rely so heavily, and incorrectly, on opinions from federal courts located in the Fourth Circuit. Those opinions are anything but "well-reasoned."

Alabama is located in the Eleventh Circuit, not the Fourth Circuit. The decisions and opinions from those federal courts in the Fourth Circuit referenced by Lochridge and CTS are neither persuasive nor binding on this Court. They also are no longer good law. Mendez v. Elliot, 45 F.3d 75 (4th Cir. 1995) is no longer treated as binding or controlling authority on courts in the Fourth Circuit, as "[r]ecently, several district courts in the Fourth Circuit have reasoned that Mendez is no longer good law, despite the fact that it has not been formally overruled, and permitted an extension of time for service absent a showing of good cause." See Craig v. Global Solution Biz LLC, 2020 WL 528015, *4 (D.S.C. Feb. 3, 2020) (citing United States ex rel. Maharaj v. Estate of Zimmerman, 2019 WL 6790645, *21 (D. Md. Dec. 12, 2019); Whetstone v. Mayor & City Council of Baltimore City, 2019 WL 1200555, *7 (D. Md.

Mar. 13, 2019); Ghazarian v. Specialized Bicycle Components, Inc., 2019 WL 315997, *2 (W.D.N.C. Jan. 24, 2019)).

Additionally, "several district courts have concluded that the 2015 Amendments to Rule 4(m), while not substantive, reflect the drafters' intent to Congressionally overrule Mendez, rendering it non-controlling." Anderson v. Dorchester County, 2021 WL 1186637, *3 n. 4 (D.S.C. Mar. 30, 2021) (citing Robinson v. G D C, Inc., 193 F. Supp. 3d 577, 581-84 (E.D. Va. 2016); Escalante v. Tobar Constr., Inc., 2019 WL 109369, *2-4 (D. Md. Jan. 3, 2019)). When analyzing delayed service of process situations like the one presently before this Court, the Eleventh Circuit has declined to follow or apply Mendez, and the Fifth Circuit has specifically rejected Mendez. See Horenkamp, 402 F.3d at 1132; Thompson, 91 F.3d at 21 n. 1 ("We necessarily reject the Fourth Circuit's approach, which treats Rule 4(m) as identical to the former Rule 4(j). [(citing Mendez)]. The Mendez opinion provides no insight as to why the court disregarded the plain language of Rule 4(m) and instead treats the rule as the mirror image of Rule 4(j)."). Fed. R. Civ. P. 4(m) differs substantially from its predecessor Rule 4(j), which is not Rule 4(m)'s "mirror image."

Alabama appellate courts have turned to decisions and opinions from federal courts addressing Fed. R. Civ. P. 4(m) for guidance when interpreting and applying Ala. R. Civ. P. 4(b). See State Farm Fire & Cas. Co. v. Smith, 39 So. 3d 1172, 1173-76 (Ala. Civ. App. 2009). Notably, Alabama courts have not sought such guidance from federal courts in the Fourth Circuit. Neither Mendez nor the Maryland federal court opinions cited by Lochridge and CTS provide any reliable guidance in deciding the issues before this Court related to Ala. R. Civ. P. 4(b). Those outlier authorities certainly do not support a decision by this Court to reverse the trial court's denial of Lochridge and CTS's motion to dismiss or hold the trial court abused the "great deal of discretion" afforded to it under Rule 4(b) "in extending the time for service of process." See Robinson, 2017 WL 2644069 at *1 (citing Lepone-Dempsey, 476 F.3d at 1281). The trial court's July 21, 2021 Order denying Lochridge and CTS's motion to dismiss is due to be affirmed.

CONCLUSION

The trial court acted well within its discretion when it denied Lochridge and CTS's motion to dismiss and extended the 120-day time period under Rule 4(b) for Tombrella to effect service on Lochridge and

CTS. The express language of Rule 4(b), which is unambiguous, and its plain meaning specifically granted the trial court the discretionary authority it exercised in this case and context. Based upon the foregoing reasons and the record in this case as it existed before the trial court on July 21, 2021, the trial court's July 21, 2021 Order denying Lochridge and CTS's motion to dismiss and its discretionary decision to extend the 120-day service period for Tombrella to effect service on the Appellants is due to be affirmed.

Respectfully submitted this 14th day of March, 2022.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limitations set forth in Ala. R. App. P. 28(j)(1). According to the word-count function of Microsoft Word, the brief contains no more than 13,645 words from the Statement of the Case/Statement of the Facts through the Conclusion. I further certify that this brief complies with the font requirements set forth in Ala. R. App. P. 32(a)(7). The brief was prepared in Century Schoolbook font using 14-point type. See Ala. R. App. P. 32(d).

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CERTIFICATE OF SERVICE

I hereby certify that I filed a copy of the foregoing with the Clerk of the Alabama Supreme Court via the Alabama Appellate E-File System on March 14, 2022, and that I have sent and served an electronic copy of the foregoing via email and also a physical copy of the foregoing via U.S. Mail, postage pre-paid, which will send notification of such filing to the following:

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